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"Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law

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“Striking for the Guardians and Protectors of the Mind”: The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law

Michael L. Perlin*

Abstract

In many nations, entry of a guardianship order becomes the “civil death” of the person affected because persons subjected to such measure are not only fully stripped of their legal capacity in all matters related to their finance and property but are also deprived of many other fundamental rights, including the right to vote, the right to consent or refuse medical treatment (including forced psychiatric treatment), freedom of association, and the right to marry and have a family. The United Nations’ ratification of the Convention on the Rights of Persons with Disabilities (CRPD) radically changes the scope of international human rights law as it applies to all persons with disabilities, and in no area is this more significant than in the mental disability law context. And there is no question that the CRPD speaks to the issue of guardianship. This article examines what impact, if any, the CRPD and other international human rights documents will have on guardianship practice around the world. This question is of great importance given the common usage of this status and the lack of procedural safeguards that attend the application of this status in many nations.

This article begins by examining *why* guardianship is considered “civil death” in much of the world before discussing the possible impact that the CRPD will have on the application of guardianship laws. Issues discussed include the need for some mechanism to insure the appointment of counsel to persons facing guardianship; the need for a mechanism to insure that, in those cases in which guardianship is inevitably necessary, “personal” guardians will be appointed instead of

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institutional ones; the need for domestic courts—in all parts of the world—to take these issues seriously when they are litigated on a case-by-case basis; and the inevitable problems that will arise in the Asia and Pacific region, where there is no regional court or commission at which litigants can seek CRPD enforcement. Finally, this article considers the impact of therapeutic jurisprudence on the questions at hand, and concludes by looking again at the CRPD as a potentially emancipatory means of restructuring guardianship law around the world.

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INTRODUCTION

I started representing persons with mental disabilities in 1971,¹ and still do.² This work has involved the representation of such individuals in the criminal trial process, in the civil commitment process, and in

1. See, e.g., *Dixon v. Cahill*, Docket No. L30977/y-71 P.W. (N.J. Super. Ct. Law Div. 1973) (discussed in Michael L. Perlin, “*May He Stay Forever Young*”: *Robert Sadoff and the History of Mental Health Law*, 33 J. AM. ACAD. PSYCHIATRY & L. 236, 236 (2005)) (final order reprinted in 5 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 14-7, at 119-21 (2d ed. 2002)). For an overview of the New Jersey Division of Mental Health Advocacy, through which the bulk of this work was done, see Michael L. Perlin, *Mental Patient Advocacy by a Public Advocate*, 54 PSYCHIATRIC Q. 169 (1982).

2. See *In re Tiffany W.*, No. 1-10-2492, 2012 WL 4243653 (Ill. App. Ct. 2012) (amicus curiae); *People v. Barrett*, 281 P.3d 753 (Cal. 2012) (same).

constitutional and statutory law reform cases.³ Until 2000, my work was exclusively domestic. But then, I made my first visits to psychiatric institutions in Central Europe⁴—under the aegis of Mental Disability Rights International (now Disability Rights International), the most prominent U.S.-based NGO doing this sort of work⁵—and my world changed.⁶ My work there—and in Central and South America, and in Asia—clarified to me that “the violations of fundamental freedom, dignity, decency, and humanity, the pervasive stigma that befalls persons with mental disabilities (attitudes that I call *sanism*), and the continued failure of courts and fact-finders to acknowledge the depths of the problems presented by shameful institutional neglect (attitudes that I call *pretextuality*) often were found to be even more pervasive in other nations than in the United States.”⁷

My visits to psychiatric institutions did not surprise me much.⁸ Conditions were deplorable.⁹ In many nations, there were virtually no community placements available for persons with mental disabilities.¹⁰

3. See, e.g., MICHAEL L. PERLIN, *A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW* (forthcoming 2013) [hereinafter PERLIN, *A PRESCRIPTION FOR DIGNITY*].

4. See Michael L. Perlin, “*Chimes of Freedom*”: *International Human Rights and Institutional Mental Disability Law*, 21 N.Y.L. SCH. J. INT’L & COMP.L. 423, 426 (2002) [hereinafter Perlin, “*Chimes of Freedom*”].

5. See DISABILITY RTS. INT’L, <http://bit.ly/ed83zr> (last visited Dec. 20, 2012).

6. See MICHAEL L. PERLIN, *INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD* vii (2012) [hereinafter PERLIN, *WHEN THE SILENCED ARE HEARD*].

7. *Id.* at viii; see also *infra* notes 105-08 and accompanying text (defining *sanism* and *pretextuality*).

8. See Perlin, “*Chimes of Freedom*,” *supra* note 4, at 424-25:

It was no surprise that the pictures that I saw in January 2002, from facilities in Bulgaria—half-dressed patients in cage-like rooms, feces smeared on the wall—eerily reflected the conditions at Willowbrook State School in New York City when they were exposed to a stunned nation some thirty years ago by the then-fledgling investigative reporter Geraldo Rivera.

9. See, e.g., Michael L. Perlin, *Online, Distance Legal Education as an Agent of Social Change*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 95, 102 (2011):

The state of mental disability law in Nicaragua is, and always has been, woeful. On a site visit there, a colleague and I were shown the Nicaraguan mental health law which, in its entirety, was one brief paragraph. On another site visit to a Nicaraguan public hospital, I observed male patients walking in wards totally naked (with both male and female staff present). Female patients were brought outside the hospital for lunch. They were wearing doctor’s office-type gowns, exposing their breasts and buttocks. Food was passed around in large bowls, and there were no utensils. Each patient had to reach in and scoop out food (some sort of vegetable stew) with her hands.

(internal citations omitted).

10. See Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 SYRACUSE J. INT’L L. & COM. 333, 350 (2007) (citing, in part, Angelika C. Moncada, *Involuntary Commitment and the Use of*

Again, I was not surprised.¹¹ But what I was surprised by—*floored* by—was what I began to learn quickly about guardianship laws in other nations, specifically those in Central and Eastern Europe (although, as I will discuss soon, I later learned that these were not the only regions of the world with such laws). I was accustomed to disability-based guardianship as it was in the United States: the enforcement of a presumption of competency, the existence of limited and plenary guardianships, the differentiation between guardianships of the person and of property, and the right to a pre-determination judicial hearing,¹² at least in theory.¹³

But as I learned, things were far different in other parts of the world. In many nations, entry of a guardianship order became the “civil death” of the person affected.¹⁴ Oliver Lewis, head of the Mental Disability Advocacy Center (MDAC), uses the “civil death” characterization

Seclusion and Restraint in Uruguay: A Comparison with the United Nations Principles for the Protection of Persons with Mental Illness, 25 U. MIAMI INTER-AM. L. REV. 589, 617 (1994); Oliver Lewis, *Mental Disability Law in Central and Eastern Europe: Paper, Practice, Promise*, 8 J. MENTAL HEALTH L. 293, 297 (2002):

Hospital authorities in Uruguay told researchers that “between one third and two thirds of the total inpatient population need not be committed but are held because they have nowhere else to go.” In other nations [in Central and Eastern Europe], “[h]undreds of thousands of people with mental health problems, intellectual disabilities, alcohol problems, drug addiction (and people with no health problems at all, so-called ‘social cases’) are housed together in [large residential institutions that] have become known as ‘social care homes.’ . . . These are institutions from which residents are rarely discharged.

11. I learned in Latvia—where I did a set of on-site visits to facilities for persons institutionalized because of mental disabilities—that if a person who lives in Riga is absent from his leased residence for a year, the lease then is terminated (at the time I was there, the rental occupancy rate was at least 98%). See Perlin, “*Chimes of Freedom*,” *supra* note 4, at 424 (discussing my work in Eastern Europe, including my work in Latvia). Thus, for any such person still institutionalized after that year, it became, in effect, a lifetime commitment.

12. See generally MICHAEL L. PERLIN ET AL., COMPETENCE IN THE LAW: FROM LEGAL THEORY TO CLINICAL APPLICATION 245-68 (2008).

13. But see *In re Mark C.H.*, 906 N.Y.S.2d 419, 432-34 (N.Y. Cnty. Surr. Ct. 2010) (discussed *infra* in text accompanying notes 92-96). By no means is enforcement of guardianship law in the United States perfect. See, e.g., Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. TOL. L. REV. 189, 189 (1994); Eric Y. Drogin, *Modern Guardianship: Legal and Clinical Perspectives*, 35 MENTAL & PHYSICAL DISABILITY L. REP. 820 (2011) (discussing an important recent critique on U.S. guardianship law). However, at the least, there has been a comprehensive body of laws and court cases in place to create a baseline as to how guardianship law *should* operate.

14. Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?* 34 SYRACUSE J. INT’L L. & COM. 563, 569 (2007); see also Amita Dhandu, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?*, 34 SYRACUSE J. INT’L L. & COM. 429, 445 n.77 (2007) (explaining “legal death”).

because a person subjected to the measure is not only fully stripped of their legal capacity in all matters related to their finance and property, but is also deprived of, or severely restricted in, many other fundamental rights, [including] the right to vote, the right to consent or refuse medical treatment (including forced psychiatric treatment), freedom of association and the right to marry and have a family.¹⁵

Guardianship is also frequently entered. In Hungary, for example, there are approximately 80,000 people under guardianship, and approximately 40,000 of these people are under guardianship without active legal capacity.¹⁶ An estimated 300,000 people in Russia alone are currently under guardianship, all stripped of their personhood and of their legal rights.¹⁷ This reality—so discordant with what I had come to expect domestically—stunned me at first, and then led me to recalibrate some of my advocacy efforts abroad because I realized the problems were much deeper than I had originally thought.

Fast forward to 2008 when the United Nations ratified the Convention on the Rights of Persons with Disabilities (CRPD).¹⁸ The CRPD radically changes the scope of international human rights law as it applies to all persons with disabilities, and in no area is this more significant than in the area of mental disability law.¹⁹ And there is no

15. *New Project on Reforming Guardianship in Russia*, MENTAL DISABILITY ADVOCACY CTR. (Aug. 11, 2009), <http://bit.ly/Xd7qR3> [hereinafter *New Project*].

16. István Hoffman & György Könczei, *Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code*, 33 LOY. L.A. INT'L & COMP. L. REV. 143, 166 n.171 (2010) (citing *Hungary: Parliament Reforms Legal Capacity Laws*, MENTAL DISABILITY ADVOCACY CTR. (Sept. 22, 2009), <http://bit.ly/Xd7u3f>).

17. See *Russian Constitutional Court Criticises "Abusive" Guardianship Law*, NILESH SINGIT'S BLOG: DISABILITY NEWS WORLDWIDE (June 28, 2012), <http://bit.ly/Tu9XjS>. On the "particularly restrictive" nature of the Russian law, see Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 144 (2012).

18. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007) [hereinafter CRPD]. For information on the CRPD, see generally PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 6, at 143-59; Press Release, United Nations, With 20 Ratifications, Landmark Disability Treaty Set to Enter into Force on 3 May (Apr. 3, 2008), available at <http://bit.ly/NvfAu4>; Tara Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF 37, 44 (Winter 2007); Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203 (2007). As of November 2012, there were 126 ratifications and 154 signatories of the Convention and 76 ratifications as well as 90 signatories of the Optional Protocol. See *Convention and Optional Protocol Signatures and Ratifications*, UNITED NATIONS ENABLE, <http://bit.ly/gCnVL9> (last visited Nov. 28, 2012) (official website of the Secretariat for the Convention on the Rights of Persons with Disabilities).

19. See, e.g., Michael L. Perlin, *"A Change Is Gonna Come": The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the*

question that the CRPD speaks to the issue of guardianship.²⁰ Professor Arlene Kanter notes:

Instead of parentalistic guardianship laws, which substitute a guardian's decision for the decision of the individual, the CRPD's supported-decision making model recognizes first, that all people have the right to make decisions and choices about their own lives.²¹

So, this discordance between guardianship-law-in-practice and guardianship-law-on-the-books joins the issue. What impact, if any, will the CRPD and other international human rights documents have on guardianship practice around the world? This question is of great importance, given the common usage of this status²² and the lack of procedural safeguards that attend the application of this status in many

Domestic Practice of Constitutional Mental Disability Law, 29 N. ILL. U. L. REV. 483 (2009) [hereinafter Perlin, "A Change is Gonna Come"].

20. The CRPD states:

Equal recognition before the law:

- (1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
- (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
- (3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
- (4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
- (5) Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

CRPD, *supra* note 18, art. 12. See generally Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8 (Winter 2012); Glen, *supra* note 17.

21. Arlene Kanter, *The United Nations Convention on the Rights of Persons With Disabilities and Its Implications for the Rights of Elderly People under International Law*, 25 GA. ST. U. L. REV. 527, 563 (2009).

22. See *supra* text accompanying notes 16-17.

nations. Although there is some recent scholarship dealing with this issue, it has not been the focus of nearly enough attention in the four years since the CRPD's ratification. I hope this article causes both scholars and advocates to take this issue more seriously in the future.

First, in Part I, I will examine *why* guardianship is considered "civil death" in much of the world, with special focuses on practices in nations in Central and Eastern Europe. As part of this examination, I will consider why designating a psychiatric institution as a patient's guardian is a conflict of interest *per se* and terribly wrong. Then, in Part II, I will briefly survey domestic law, with special focus on distinctions that are drawn between guardianships of the person and of property, and between limited and plenary guardianships. After that, in Part III, I will analyze the CRPD, the relevant literature about that Convention's possible impact on the application of guardianship laws, and the meager case law that has emerged, with specific focus on the question as to how the CRPD potentially can reshape guardianship law internationally.

In Part IV, I will raise some "red flags" that must be confronted during this inquiry. Such issues include the need for some mechanism to ensure the appointment of counsel to persons facing guardianship; the need for a mechanism to ensure that, in those cases in which guardianship is inevitably necessary, "personal" guardians will be appointed instead of institutional ones; the need for domestic courts—in all parts of the world—to take these issues seriously when they are litigated on a case-by-case basis; and the inevitable problems that will arise when our attention is drawn to Asia and the Pacific, where there is no regional court or commission at which litigants can seek enforcement of the CRPD.

Finally, in Part V, I will consider the impact of the school of therapeutic jurisprudence on the questions at hand. I will conclude by looking again at the CRPD as a potentially emancipatory means of restructuring guardianship law around the world, but if—and only if—the variables discussed immediately above can be resolved.

My title comes from Bob Dylan's brilliant song *Chimes of Freedom*.²³ *Chimes* is Dylan's "most political song" and an expression

23. I have previously drawn on *Chimes* five other times as inspirations for titles of scholarly articles. See, e.g., Perlin, "*Chimes of Freedom*," *supra* note 4; Michael L. Perlin, "*Through the Wild Cathedral Evening*": *Barriers, Attitudes, Participatory Democracy, Professor tenBroek, and the Rights of Persons with Mental Disabilities*, 13 TEX. J. C.L. & C.R. 413 (2008); Michael L. Perlin, "*For the Misdemeanor Outlaw*": *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193 (2000); Michael L. Perlin, "*With Faces Hidden While The Walls Were Tightening*": *Applying International Human Rights Standards To Forensic Psychology*, 7 U.S.-CHINA L. REV. 1 (2010); Astrid Birgden & Michael L. Perlin, "*Tolling for the Luckless, the Abandoned and Forsaken*": *Community Safety*,

of “affinity” for a “legion of the abused.”²⁴ The phrase “striking for the guardians and protectors of the mind” is from this apocalyptic verse:

Through the mad mystic hammering of the wild ripping hail
 The sky cracked its poems in naked wonder'
 That the clinging of the church bells blew far into the breeze
 Leaving only bells of lightning and its thunder
 Striking for the gentle, striking for the kind
 Striking for the guardians and protectors of the mind
 An' the unpawned painter behind beyond his rightful time
 An' we gazed upon the chimes of freedom flashing.²⁵

Elsewhere, writing about *Chimes*, I have said, “Dylan’s magnificent, apocalyptic language in *Chimes* cries out for equality and the emancipation of those isolated from the mainstream of society.”²⁶ This article is also about those similarly “isolated from the mainstream of society.”

I. GUARDIANSHIP IN OTHER NATIONS

As I noted above, the entry of guardianship orders in much of the world is a kind of “civil death.”²⁷ In many nations, such guardianship is regularly plenary and permanent.²⁸ The distinctions between guardianship over the person and guardianship over property and the distinctions between limited and plenary guardianships—present, at least in theory, in the United States²⁹—are completely missing.³⁰

Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees, 13 LEGAL & CRIMINOL. PSYCHOL. 231 (2008). And, there being no coincidences in law reform or music, on the evening of the day that I finished the penultimate draft of this article, November 21, 2012, I saw Dylan sing *Chimes of Freedom* in Brooklyn, New York.

24. Michael L. Perlin, *Tangled Up In Law: The Jurisprudence of Bob Dylan*, 38 FORD. URB. L.J. 1395, 1418 (2010) (citing, in part, ROBERT SHELTON, NO DIRECTION HOME: THE LIFE AND MUSIC OF BOB DYLAN 157-58 (1997)) [hereinafter Perlin, *Tangled Up in Law*].

25. *Chimes of Freedom*, BOBDYLAN.COM, <http://bit.ly/H1ncAB> (last visited Nov. 29, 2012).

26. Perlin, *Tangled Up in Law*, *supra* note 24, at 1419.

27. See Lawson, *supra* note 14, at 568.

28. See, e.g., Michael Stein, *China and Disability Rights*, 33 LOY. L.A. INT'L & COMP. L. REV. 7, 19 n.87 (2010).

29. See Dinerstein, *supra* note 20, at 9:

Full or plenary guardianship may or may not provide protection to the individual with a disability—there are numerous examples of guardians who

Also, in many nations, in cases of individuals institutionalized because of psychosocial or intellectual disabilities, when a guardianship is entered, the institution in which that person is housed is often named the person's guardian.³¹ The potential conflict of interest here is obvious,³² in those nations in which there is a modicum of due process in the guardianship procedure, the institution is regularly seen as the "last resort" in the guardianship selection process,³³ not the default choice. Studies regularly show that institutional abuse is "facilitated, and not prevented, by guardianships."³⁴ The system is hopelessly "antiquated."³⁵

A report by the Secretary General of the United Nations is clear: "The concept of guardianship is frequently used improperly to deprive individuals with an intellectual or psychiatric disability of their legal capacity without any form of procedural safeguards."³⁶ Even *prior* to the ratification of the CRPD,³⁷ guardianship-as-usual violated international human rights law:

have taken advantage of, ignored, or otherwise failed to serve the interests of the person they were supposedly protecting—but even when it is functioning as intended it evokes a kind of "civil death" for the individual, who is no longer permitted to participate in society without mediation through the actions of another if at all.

30. See *id.* at 9-12.

31. See Oliver Lewis, *Stanev v. Bulgaria: On the Pathway to Freedom*, 19 HUM. RTS. BRIEF 2, 2 (Winter 2012).

32. Consider, by way of example, the question of an individual's right to refuse the involuntary imposition of antipsychotic medication. See, e.g., Michael L. Perlin, "And My Best Friend, My Doctor, Won't Even Say What It Is I've Got": *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735 (2005) [hereinafter Perlin, *Role of Counsel*]; Michael L. Perlin & Deborah A. Dorfman, *Is It More Than "Dodging Lions and Wastin' Time"? Adequacy of Counsel, Questions of Competence, and the Judicial Process in Individual Right to Refuse Treatment Cases*, 2 PSYCHOL. PUB. POL'Y & L. 114 (1996). If the patient's guardian is the institution wishing to medicate the person over the person's wishes, it becomes an absurdity to consider this a fair or equitable process.

33. See, e.g., Maryann Zavez, *Use of the Adoption and Safe Families Act at 15/22 Months for Incarcerated Parents*, 33 VT. L. REV. 187, 198 (2008) (discussing *In re A.S. & K.S.*, 764 A.2d 1188, 1191 (Vt. 2000)).

34. Dhanda, *supra* note 14, at 455 n.77, 445-46 (citing studies).

35. Bryan Y. Lee, *The U.N. Convention on the Rights of Persons with Disabilities and Its Impact upon Involuntary Civil Commitment of Individuals with Developmental Disabilities*, 44 COLUM. J.L. & SOC. PROBS. 393, 396 (2011).

36. U.N. Secretary-General, *Progress of Efforts to Ensure the Full Recognition and Enjoyment of the Human Rights of Persons with Disabilities*, ¶ 15, U.N. Doc. A/58/181 (July 24, 2003), available at <http://bit.ly/TBRJfO> [hereinafter *Full Recognition*].

37. In 1991, the UN published the "MI Principles." See *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, G.A. Res. 46/119, Annex, U.N. Doc. A/RES/46/119/Annex (Dec. 17, 1991). These principles "established the most comprehensive international human rights standards at that time for persons with mental disabilities, and their adoption was a critical global step in recognizing mental disability rights issues within the human rights arena." Michael L. Perlin, "Abandoned Love": *The Impact of Wyatt v. Stickney on the Intersection between*

Thus, persons are deprived of their right to make some of the most important and basic decisions about their life on account of an actual or perceived disability without a fair hearing and/or periodical review by competent judicial authorities. The lack of due process guarantees may expose the individual whose capacity is at stake to several possible forms of abuse. An individual with a limited disability may be considered completely unable to make life choices independently and placed under “plenary guardianship”. Furthermore, guardianship may be improperly used to circumvent laws governing admission in mental health institutions, and the lack of a procedure for appealing or automatically reviewing decisions concerning legal incapacity could then determine the commitment of a person to an institution for life on the basis of an actual or perceived disability.³⁸

The Mental Disability Advocacy Center—the most prominent European advocacy group working on behalf of persons with mental disabilities—characterizes the issue in this manner:

Guardianship [is] a legal mechanism in which human rights abuses can be all pervasive. In many countries it is a legal mechanism that serves to perpetuate and hide abuses and to defy accountability for perpetrators. Once a medical expert recommends and a judge decides that a person is unable to make day-to-day decisions, that person will be formally stripped of their legal capacity. Once stripped of legal capacity a guardian, often unknown, will be appointed. As depriving someone of legal capacity often also deprives them of the legal right to enter into contracts, instruct a lawyer, to vote or own property, to marry or even to bring up children. That guardian will make all or most decisions for the person with disabilities, and will make them in the person’s “best interests”, which might not be what the person with disabilities actually wants.³⁹

International Human Rights and Domestic Mental Disability Law, 35 LAW & PSYCHOL. REV. 121, 128 (2011) [hereinafter Perlin, *The Impact of Wyatt v. Stickney*]; see also Neil Rees, *International Human Rights Obligations and Mental Health Review Tribunals*, 10 PSYCHIATRY PSYCHOL. & L. 33 (2003).

38. *Full Recognition*, *supra* note 36, at 6-7.

39. *Legal Capacity*, MENTAL DISABILITY ADVOCACY CTR., <http://bit.ly/U8TiB7> (last visited Dec. 1, 2012); see also *New Project*, *supra* note 15:

The impact of guardianship on a person’s freedom and autonomy is exacerbated by weak regulation of guardians’ responsibilities and deficient procedural safeguards related to withdrawing and restoring legal capacity and appointing a guardian. These insufficient legal guarantees make it shockingly easy for a person to find themselves deprived of legal capacity. It is almost impossible to have one’s legal capacity restored, because a person placed under guardianship does not have the right to apply to court to initiate proceedings, and the matter rests effectively with their guardian.

This result is terribly wrong for many reasons. Granting guardians the power to place adults into mental health and social care institutions and restrict them from leaving deprives them of the whole constellation of rights to which they are entitled under international human rights law.⁴⁰ Assuming that a person who may be capable of exercising autonomous decisionmaking in one aspect of life is incapable of exercising such decisionmaking in *all* aspects of life makes no sense and is discordant with all valid and reliable research.⁴¹ Failing to provide periodic review and reassessment of guardianship orders violates every concept of due process.⁴²

Several major cases have identified the abuses inherent in this systemic deprivation of rights. In *Stanev v. Bulgaria*,⁴³ the European Court of Human Rights found that Bulgaria violated Articles 3, 5, 6, and 13 of the European Convention on Human Rights in denying an individual with schizophrenia under guardianship the right to both challenge his confinement to a decrepit and unclean social care home and seek restoration of his legal capacity. Oliver Lewis, one of Stanev's lawyers, explains the back-story of the case:

On December 10, 2002, when he was 46-years old, an ambulance picked up Rusi Stanev at his home where he lived alone. He was bundled inside and driven 400km to an institution for "adults with mental disorders." His transfer into the institution was arranged through an agreement by a municipal official acting as Mr. Stanev's guardian (*the guardian had never met Mr. Stanev* and signed off on the institutional placement a mere six days after becoming his guardian) and the institution's director. It was arranged on the basis that Mr. Stanev had a diagnosis of schizophrenia and that his relatives did not want to care for him. Mr. Stanev knew nothing about this agreement and did not want to leave his home. No one told him how

40. As the MDAC also notes, "When children with mental disabilities reach the age of 18, they are often automatically deemed 'incapable' and placed under guardianship." *Id.*

41. See, e.g., Daniel Marson & Andrea Solomon, *Legal and Ethical Issues*, in TEXTBOOK OF GERIATRIC NEUROPSYCHIATRY 363 (C. Edward Coffey & Jeffrey L. Cummings eds., 3d ed. 2011); Piers Gooding, *Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law*, 19 PSYCHIATRY PSYCHOL. & L. 1 (2012), available at <http://bit.ly/Ui68PH>.

42. See, e.g., Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism after Medellin*, 115 PENN ST. L. REV. 1051, 1060 (2011); Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 867, 912 (2002).

43. *Stanev v. Bulgaria*, App. No. 36760/06, Eur. Ct. H.R. (2012), available at <http://bit.ly/Typ5zW>. See generally, Dinerstein, *supra* note 20, at 12 n.57; Lewis, *supra* note 31.

long he would stay in the institution, or why he was being taken there.⁴⁴

Similarly, in Russia, the Constitutional Court has ruled that discrimination against persons with mental disabilities is impermissible under the Russian Constitution. In its opinion, the Court underscored that guardianship is a “very serious” interference with the right to privacy and that the interests of a person under guardianship must be especially protected due to the significant loss of fundamental rights and freedoms of people under guardianship.⁴⁵ Subsequently, that Court quashed as unconstitutional the lack of alternatives to plenary guardianship, ordering the parliament to enact a new law “which better respects people’s decision-making capacity.”⁴⁶

Even more recently, the European Court of Human Rights has ruled that Czech Republic domestic guardianship law violated the European Convention of Human Rights. In *Sykora v. The Czech Republic*, the Court struck down domestic law provisions that allowed a guardian to authorize detention of another without any control. The ruling also struck down a guardian’s ability to make decisions of “serious consequences” about the person under guardianship, resulting in situations in which the legal representative of that person “effectively took no part in the proceedings” and where the judge “had no personal contact with the applicant,” finding such provisions to be “serious deficiencies” in the machinery of justice.⁴⁷

Guardianship abuses are not limited to Central and Eastern Europe.⁴⁸ A recent report on abuses of the involuntary civil commitment process in China corroborates this view:

Once individuals have been brought to psychiatric hospitals in China, hospital authorities and staff respond only to the wishes and requests of those who authorized the commitment, not to the committed. Hospitals refer to the committing party as the “guardian” of the

44. See Lewis, *supra* note 31, at 2 (emphasis added).

45. See *Shtukurov v. Russia*, App. No. 44009/05, Eur. Ct. H.R. ¶ 90 (2008), available at <http://bit.ly/130rtWF>; *Russia Paves Way for Mental Health Rights*, INT’L DISABILITY AND HUM. RTS. NETWORK, <http://bit.ly/XbklN> (last visited Nov. 13, 2012).

46. *In re the Constitutionality Review of Clauses 1 and 2 of Art. 29, Cl. 2 of Art. 31 and Art. 32 of the Civil Code of the Russ. Fed’n in Connection with the Appeal of I.B. Delova*, ROSSIISKAIA GAZETA [Ros. Gaz.] June 27, 2012, No. 15-P, available at <http://bit.ly/Vchfbs>.

47. *Sykora v. The Czech Republic*, App. No. 23419/07, Eur. Ct. H.R. (2012), available at <http://bit.ly/RrmXer>.

48. See, e.g., Roger Bill, *Plenary Guardianship: Persons with Disabilities Made Vulnerable*, MCGILL BLOGS (July 10, 2012, 4:10 PM), <http://bit.ly/11gni5q> (citing example from Mexico); *Ghana: People With Mental Disabilities Face Serious Abuse*, HUM. RTS. WATCH (Oct. 2, 2012), <http://bit.ly/SzzC8w> (citing example from Ghana).

committed and allow the latter to authorize both the admittance as well as the discharge of these individuals. This guardianship is established despite the fact that the General Principles of Civil Law (the "General Principles") stipulates that that only after a citizen has been declared legally incompetent by a court can a guardian act on behalf of that citizen. As further discussed below, there are also cases in which Chinese courts assume that those who have been held in psychiatric hospitals are legally incompetent, and thus cannot act as plaintiffs in lawsuits they may wish to bring against the institutions in which they have been held or the parties who initiated the commitment. In both law and practice in China, the norm of "substitute decision-making"—where people with psychosocial disabilities are considered unable to make decisions for themselves and thus need to have decisions made for them by their guardians—undermines their ability to enjoy legal capacity on equal basis with others, a requirement of the CRPD.⁴⁹

In short, the guardianship system in much of the world violates the basic tenets of international human rights law, due process, and human dignity.⁵⁰

II. GUARDIANSHIP IN THE UNITED STATES⁵¹

A. *The Significance of Contemporary Reform Statutes*

At best, guardianship will provide personal care and property management that an individual with a disability alone cannot handle. At worst, it will deprive that individual of decision-making authority that he or she *does* have the capacity to handle, and will, at the same time, create the opportunity for personal or financial abuse.⁵² Historically, the standard of competency for guardianship was an "all or nothing" test,⁵³

49. CHINESE HUM. RTS. DEFENDERS, *THE DARKEST CORNERS: ABUSES OF INVOLUNTARY PSYCHIATRIC COMMITMENT IN CHINA* 12 (2012), available at <http://bit.ly/YBkK23> (reported to the UN Committee on the Rights of Persons with Disabilities for its review of the People's Republic of China in September 2012); see also *Mental Hospitals' Abuse Rights*, RADIO FREE ASIA (Aug. 27, 2012), <http://bit.ly/OpnKca> (discussing CHRD report). On how substituted decision-making leads to guardianship in China, see Stein, *supra* note 28, at 18-19.

50. I discuss the role of dignity in international human rights law in a mental disability law context in PERLIN, *WHEN THE SILENCED ARE HEARD*, *supra* note 6, at 37-41, and in PERLIN, *A PRESCRIPTION FOR DIGNITY*, *supra* note 3, ch. 7.

51. For an overview of domestic guardianship law, see generally PERLIN ET AL., *supra* note 12, at 245-68. For a helpful history, see Glen, *supra* note 17, at 107-11.

52. PERLIN ET AL., *supra* note 12, at 246.

53. See, e.g., BARRY R. FURROW ET AL., *BIOETHICS: HEALTH CARE LAW AND ETHICS* 247 (3d ed. 1997); Debra H. Kroll, *To Care or Not to Care: The Ultimate Decision for Adult Caregivers in a Rapidly Aging Society*, 21 TEMP. POL. & CIV. RTS. L. REV. 403, 435 (2012) ("In the past, guardianships were rarely granted with any form of limitation and

and it is only in recent times that decisional capacity has instead been viewed along a continuum as a matter of degree.⁵⁴ Modern guardianship statutes provide—on paper, at least—procedural protections, including the right to notice, counsel, and a hearing.⁵⁵ Recent reforms “reflect an increased concern for protection of [persons subjected to guardianship] from invasions of their autonomy that are not necessary for [their] protection,” placing an emphasis on “limiting a guardian’s powers and increasing the degree of communication between the guardian and the ward.”⁵⁶

Contemporaneous “reform” statutes make clear distinctions between personal/property and limited/plenary guardianships,⁵⁷ and counsel must be available to the person in peril of losing civil rights at this stage.⁵⁸ Although there is all too often a gap between law-on-the-books and law-in-practice in this area,⁵⁹ the domestic model at least provides, in theory, a baseline of minimal due process protections that can and should guide further developments in law and policy in this area.

I turn now to what should be the “game changer” in applying guardianship laws to persons with mental disabilities: the ratification of the CRPD.

tended to be extremely restrictive of the individual’s autonomy.”); Rose Mary Bailly & Charis B. Nick-Torok, *Should We Be Talking?—Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 ALB. L. REV. 807, 812 (2012) (“For a long time, the law viewed an individual’s ‘incompetence in simple black and white terms.’”).

54. William M. Altman et al., *Autonomy, Competence, and Informed Consent in Long Term Care: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1671, 1678 (1992); see Kroll, *supra* note 53, at 435 (“[N]umerous states [now] recognize in their guardianship statutes that mental capacity is not always an ‘all or nothing phenomenon.’”).

55. PERLIN ET AL., *supra* note 12, at 251-53.

56. *Id.* at 268. Such limitations give the individual the possibility of retaining at least some decisionmaking autonomy. See Lee, *supra* note 35, at 395; Kroll, *supra* note 53, at 435.

57. See Kroll, *supra* note 53, at 435-36; Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?*, 4 ST. LOUIS U. J. HEALTH L. & POL’Y 279, 295-97 (2011); Nina Kohn, *The Lawyer’s Role in Fostering an Elder Rights Movement*, 37 WM. MITCHELL L. REV. 49, 55 (2010).

58. A. KIMBERLY DAYTON ET AL., ADVISING THE ELDERLY CLIENT § 34.21 *et seq.* (2007). Such a right is statutorily mandated in at least two-thirds of American states. See Kingshuk K. Roy, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 ELDER L.J. 109, 121 (2003).

59. See Salzman, *supra* note 57, at 295 n.73 (citing Jennifer L. Wright, *Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA*, 33 INT’L J.L. & PSYCHIATRY 350, 367 n.144 (2010)) (discussing how one study of guardianship orders in Colorado found that, while approximately one-third of the guardianship orders were technically “limited” orders, they were actually “plenary orders with some specific limitations on the guardians’ powers added in”). Note how Judge Glen refers to New York’s law as “a near ‘model’ statute.” Glen, *supra* note 17, at 111.

III. THE CRPD⁶⁰

A. *Toward a New Framework of Disability*⁶¹

The Convention on the Rights of Persons with Disabilities (CRPD) "is regarded as having finally empowered the 'world's largest minority' to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection."⁶² This Convention is the most revolutionary international human rights document ever created that applies to persons with disabilities.⁶³ The Disability Convention furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in almost every aspect of life.⁶⁴ It firmly endorses a social model of disability—a clear and direct repudiation of the medical model that traditionally was part-and-parcel of mental disability law.⁶⁵ "The Convention responds to traditional models, situates disability within a social model framework, and sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities."⁶⁶ It provides a framework for ensuring that

60. For more complete discussions of the historical context of the development of the CRPD, see generally Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, in MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 80-94 (Michael Dudley et al. eds., 2012); PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 6, at 143-58; Perlin, "A Change is Gonna Come," *supra* note 19.

61. This section is largely adopted from PERLIN, A PRESCRIPTION FOR DIGNITY, *supra* note 3, ch. 4.

62. Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 4 n.17 (2008). See, for example, the statements made by the High Commissioner For Human Rights, Louise Arbour, and the permanent representative of New Zealand and chair of the ad-hoc committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Ambassador Don Mackay, at a special event on the Convention on the Rights of Persons with Disabilities that was convened by the U.N. Human Rights Council on March 26, 2007. These statements are available at <http://bit.ly/TzETzv>. See generally Glen, *supra* note 17, at 134-37.

63. See Perlin & Szeli, *supra* note 60; PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 6, at 3-21. See generally Perlin, "A Change is Gonna Come," *supra* note 19 (on the overall significance of the CRPD to this population).

64. See, e.g., Aaron A. Dhir, *Human Rights Treaty Drafting Through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 41 STAN. J. INT'L L. 181, 199 (2005).

65. See generally Perlin, *The Impact of Wyatt v. Stickney*, *supra* note 37.

66. Janet E. Lord & Michael A. Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT'L L.J. 249, 256 (2009). For additional research on how the CRPD fits within a social framework, see the following sources: Janet E. Lord, David Suozzi & Allyn L. Taylor, *Lessons From the*

mental health laws “fully recognize the rights of those with mental illness.”⁶⁷ There is no question that it has “ushered in a new era of disability rights policy.”⁶⁸

The CRDP describes disability as a condition arising from “interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others.”⁶⁹ Instead of inherent limitations, the description reconceptualizes mental health rights as disability rights⁷⁰ and extends existing human rights to take into account the specific rights experiences of persons with disabilities.⁷¹ To this end, it calls for “respect for inherent dignity”⁷² and “non-discrimination.”⁷³ Subsequent articles declare “freedom from torture or cruel, inhuman or degrading treatment or punishment,”⁷⁴ “freedom from exploitation, violence and abuse,”⁷⁵ and a right to protection of the “integrity of the person.”⁷⁶

The CRPD is unique because it is the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities.⁷⁷ It not only clarifies that States should not discriminate against persons with disabilities, but also explicitly sets out the many steps that States must take to create an enabling environment so

Experience of U.N. Convention on the Rights of Persons with Disabilities: Addressing the Democratic Deficit in Global Health Governance, 38 J.L. MED. & ETHICS 564, 568 (2010); H. Archibald Kaiser, *Canadian Mental Health Law: The Slow Process of Redirecting the Ship of State*, 17 HEALTH L.J. 139, 164 (2009); Ronald McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections* (Sydney Law Sch. Research Paper No. 10/30, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1563883.

67. Bernadette McSherry, *International Trends in Mental Health Laws: Introduction*, 26 LAW IN CONTEXT 1, 8 (2008).

68. Paul Harpur, *Time to Be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change*, 45 VAL. U. L. REV. 1271, 1295 (2011).

69. See CRPD, *supra* note 18, art. 1.

70. Phillip Fennel, *Human Rights, Bioethics, and Mental Disorder*, 27 MED. & L. 95 (2008).

71. See Frédéric Mégret, *The Disabilities Convention: Toward a Holistic Concept of Rights*, 12 INT'L J. HUM. RTS. 261, 268 (2008); see also PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 6, at 143-58.

72. CRPD, *supra* note 18, art. 3(a).

73. *Id.* art. 3(b).

74. *Id.* art. 15.

75. *Id.* art. 16.

76. *Id.* art. 17.

77. Michael L. Perlin, *Promoting Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to Give Life to the UN Convention on the Rights of Persons with Disabilities*, 44 GEO. WASH. INT'L L. REV. 1, 22 (2012) [hereinafter Perlin, *Promoting Social Change*].

that persons with disabilities can enjoy authentic equality in society.⁷⁸ One of the most critical issues in seeking to bring life to international human rights law in a mental disability law context is the right to adequate and dedicated counsel. The CRPD mandates that "States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."⁷⁹ Elsewhere, the convention commands:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.⁸⁰

The extent to which this Article is honored in signatory nations will have a "major impact on the extent to which this entire Convention affects persons with mental disabilities."⁸¹ If, and only if, there is a mechanism for the appointment of dedicated counsel,⁸² can this dream become a reality.

The ratification of the CRPD marks the most important development ever seen in institutional human rights law for persons with mental disabilities. The CRPD is detailed, comprehensive, integrated, and is the result of a careful drafting process.⁸³ It seeks to reverse the results of centuries of oppressive behavior and attitudes that have stigmatized persons with disabilities. Its goal is clear: to promote, protect, and ensure the full and equal enjoyment of all human rights and

78. On the changes that ratifying states need to make in their domestic involuntary civil commitment laws to comply with Convention mandates, see Lee, *supra* note 35; see also Hoffman & Kőnczei, *supra* note 16 (on the application of the CRPD to capacity issues); Kathryn D. DeMarco, *Disabled by Solitude: The Convention on the Rights of Persons with Disabilities and Its Impact on The Use of Supermax Solitary Confinement*, 66 U. MIAMI L. REV. 523 (2012) (on the application of the CRPD to solitary confinement in correctional institutions).

79. See Michael L. Perlin, "I Might Need a Good Lawyer, Could Be Your Funeral, My Trial": A Global Perspective on the Right to Counsel in Civil Commitment Cases, and Its Implications for Clinical Legal Education, 28 WASH. U. J.L. & POL'Y 241, 252-53 (2008) [hereinafter Perlin, *A Global Perspective*] (quoting CRPD, *supra* note 18, art. 12).

80. CRPD, *supra* note 18, art. 13.

81. Perlin, *A Global Perspective*, *supra* note 79, at 253.

82. On the significance of "cause lawyers" in the development of mental disability law in the United States, see Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, Book Review, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1661 (2010) ("By 'cause lawyers' we mean attorneys who spend a significant amount of their professional time designing and bringing cases that seek to benefit various categories of people with disabilities and who have formal connections with disability rights organizations.").

83. Perlin, *Promoting Social Change*, *supra* note 77, at 23.

fundamental freedoms of all persons with disabilities; and to promote respect for their inherent dignity.⁸⁴ Whether these goals can actually be accomplished is still far from a settled matter.

B. Key Articles in the CRPD

Article 12 directly implicates guardianship law and policy by its invocation of the right to legal capacity and its mandate that nations “must take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”⁸⁵ Other CRPD Articles also make clear that the practices in the nations described above fall far short of the most basic international law standards.⁸⁶ If these Articles “guarantee persons with disabilities rights to enjoy freedom from institutionalization and live in the community setting of their choice,”⁸⁷ as Meghan Flynn suggests, then a guardianship system that consigns such individuals to unwarranted and segregated institutional living violates international human rights law.

C. Impact of the CRPD on Guardianship Practice

As a court must tailor a guardianship order to afford an incapacitated individual the maximum amount of independence possible, and may grant a guardian powers only in the specific areas in which it determines that the individual requires assistance,⁸⁸ it should be clear that implementation of the CRPD can only further these policy goals. The CRPD’s positing of “a new international norm for government policies by replacing the medical and social models with a human rights paradigm”⁸⁹ will lead—*must* lead—to a new reconceptualization of guardianship worldwide in those nations that have ratified the Convention. The Convention forces us to abandon substituted decisionmaking paradigms and to replace them with supported

84. CRPD, *supra* note 18, art. 1.

85. *Id.* art. 12.

86. See CRPD, *supra* note 18, art. 19 (“all persons with disabilities” have the right “to live in the community”); CRPD, *supra* note 18, art. 14 (state parties must “ensure that persons with disabilities, on an equal basis with others[,] [e]njoy the right to liberty and security of person . . .”); see also Kevin Cremin, *Challenges to Institutionalization: The Definition of “Institution” and the Future of Olmstead Litigation*, 17 TEX. J. C.L. & C.R. 143, 171-73 (2012).

87. Cremin, *supra* note 86, at 173 (quoting Meghan Flynn, *Olmstead Plans Revisited: Lessons Learned from the U.N. Convention on the Rights of Persons with Disabilities*, 28 LAW & INEQ. 407, 424 (2010)).

88. See Kevin Cremin et al., *Ensuring a Fair Hearing for Litigants with Mental Illnesses: The Law and Psychology of Capacity, Admissibility, and Credibility Assessments in Civil Proceedings*, 17 J.L. & POL’Y 455, 461 (2009).

89. Harpur, *supra* note 68, at 1290.

decisionmaking ones.⁹⁰ Drawing substantially on the work of Leslie Salzman, Kevin Cremin summarizes the significance of the CRPD for the purposes of reshaping guardianship laws:

Guardianship programs have also been criticized as potentially violating the integration mandate. Leslie Salzman has made a compelling case that substituted decision making systems "violate the [ADA]'s mandate to provide services in the most integrated and least restrictive manner." Although people who have guardians might "reside in the community and are not physically segregated by the walls of an institution, guardianship creates a legal construct that parallels the isolation of institutional confinement." Like institutionalization, guardianship entails the loss of civic participation—"when the state appoints a guardian and restricts an individual from making his or her own decisions, the individual loses crucial opportunities for interacting with others." There is evidence that guardianship often leads to institutionalization. Salzman emphasizes that less segregated options than guardianship are used by other countries and that the CRPD dictates supported—as opposed to substituted—decision making.⁹¹

Certainly, the most important domestic case that has considered these issues is *In re Mark C.H.*⁹² In finding that guardianship appointments must be subject to requirements of periodic reporting and review, Surrogate Judge Kristen Booth Glen relied on the CRPD in support of her decision, reasoning that international human rights norms were relevant to the case before her, and "more broadly, [to] the situation of persons with intellectual disabilities, by virtue of the Supremacy Clause."⁹³ In addition, whatever treaty obligations the United States might eventually assume, "[I]nternational adoption of the protection of the rights of persons with intellectual and other disabilities, including the right to periodic review of burdens on individual liberty, is entitled to

90. Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 161 (2010); see also Kanter, *supra* note 21, at 563.

91. Cremin, *supra* note 86, at 179 (citing, *inter alia*, Salzman, *supra* note 90, at 157; Joseph A. Rosenberg, *Poverty, Guardianship, and the Vulnerable Elderly: Human Narrative and Statistical Patterns in a Snapshot of Adult Guardianship Cases in New York City*, 16 GEO. J. ON POVERTY L. & POL'Y 315, 341 (2009)). Judge Glen characterizes Salzman's work in this context as "insightful and provocative." Glen, *supra* note 17, at 128.

92. *In re Mark C.H.*, 906 N.Y.S.2d 419, 433 (N.Y. Cnty. Surr. Ct. 2010). On the significance of this case in the context of Article 12, see Dinerstein, *supra* note 20, at 12. Judge Glen writes movingly about the litigant in *Mark C.H.* extensively in Glen, *supra* note 17, at 167-69.

93. *In re Mark C.H.*, 906 N.Y.S.2d at 432.

‘persuasive weight’ in interpreting our own law and constitutional protection.”⁹⁴

Judge Glen referred to Article 12 of the Convention, concluding that “state interventions, like guardianships, pursuant to *parens patriae* power, must be subject to periodic review to prevent the abuses which may otherwise flow from the state’s grant of power over a person with disabilities such as those covered by [state law].”⁹⁵ In addition, Judge Glen noted that, besides Article 12, other CRPD Articles provided persons with disabilities with a “plethora of rights” in this regard.⁹⁶ According to Henry Dlugacz and Christopher Wimmer, this decision supports the position that “access to supported decision-making is now the preferred norm by international treaty.”⁹⁷

The Inter-American Committee for the Elimination of All Forms of Discrimination Against Persons with Disabilities has also been relied upon Article 12 “as persuasive authority in examining . . . the meaning of the Inter-American disability convention.”⁹⁸ And, in a domestic

94. *Id.* at 434 (citing, *inter alia*, *Lawrence v. Texas*, 539 U.S. 558, 576 (2003)).

95. *Id.* at 433. On the importance of a careful reading of Article 12, see Dhanda, *supra* note 14:

The text of Article 12 does not prohibit substituted decisionmaking and there is language which could even be used to justify substitution. Under the circumstances, it could well be argued that the Article would be a stranglehold of the past on the Convention. However, such a contention can be made only if the universal reach of the capacity formulation is diluted or ignored and the article is read divorced from the process of advocacy and negotiation. [E]very effort at keeping legal capacity shackled to the past has been challenged and fought. When viewed in the light of these processes, then the paradigm shift made by the article can be seen and appreciated.

Id. at 460-61.

96. *E.g.*, CRPD, *supra* note 18, art. 15 (right to freedom from degrading punishment), art. 16 (freedom from exploitation), art. 22 (right to privacy). “Unsupervised, unreviewed guardianships of persons with mental retardation and developmental disability may, sadly, result in violations of any or all of these protected rights.” See *In re Mark C.H.*, 906 N.Y.S.2d at 433 n.47.

97. Henry Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL’Y 331, 362 (2011). Subsequently, in *In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848 (N.Y. Cnty. Surr. Ct. 2012), Judge Glen again used the CRPD as a source of rights in a guardianship matter, finding that supported decisionmaking, rather than substituted decisionmaking, was “consistent with international human rights, most particularly Article 12 of the . . . CRPD,” *id.* at 853, noting that the CRPD was entitled to “‘persuasive weight’ in interpreting our own laws and constitutional protections,” *id.* at 855.

98. Dinerstein, *supra* note 20, at 12 (discussing *General Observation of the Committee for the Elimination of all Forms of Discrimination against Persons with Disabilities on the need to interpret Article I.2.b in fine of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities within the framework of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities*, CEDDIS/doc. 12(1-E/11) rev. 1 (Apr. 28, 2011)).

Australian case (involving an application to set aside wills because of testamentary incapacity) the Supreme Court of the State of Victoria, in the course of its decision, stated the following about the CRPD:

The CRPD marks a paradigm shift in approaches to persons with disabilities. It reflects a movement from treating persons with disabilities as objects of social protection towards treating them as subjects with rights, who are capable of claiming and exercising those rights and making decisions based on free and informed consent as active members of society.⁹⁹

We can thus say, with some assuredness, that a properly enforced CRPD has the potential to influence significantly the business of guardianship-as-usual around the world.¹⁰⁰

IV. "RED FLAGS" ON THE HORIZON

These ameliorative changes do not mean that this is an area free of concern. I believe it is imperative that we consider four interrelated questions before we allow ourselves to become *too* optimistic about the developments just discussed: (1) the need for dedicated counsel, (2) the need for alternative non-institutional guardians, (3) the likelihood that domestic courts will take the interplay between guardianship laws and international human rights law seriously, and (4) the dilemma of Asia.

A. *Need for Counsel*

There is no question that the key to meaningful CRPD enforcement—and the most critical determining factor of whether the CRPD will actually be as emancipatory as its potential suggests (and as some literature predicts)¹⁰¹—is the availability and presence of dedicated and committed counsel to provide representation to the population in question. Without the presence of vigorous, advocacy-focused counsel,

99. *Nicholson v Knaggs* [2009] VSC 64 (Austl.) (unreported, Vickery J.) (discussed in PERLIN, *WHEN THE SILENCED ARE HEARD*, *supra* note 6, at 154).

100. See Glen, *supra* note 17, at 155 ("The CRPD itself provides an implementation mechanism through which transition to the new paradigm can be achieved.").

101. See, e.g., Michael A. Schwartz, *America's Transformation: The Arc of Justice Bends toward the Deaf Community*, 45 VAL. U. L. REV. 845, 848 (2011) ("The language of rights became a rallying cry for disability rights advocates whose dreams of emancipation and justice drew inspiration from the struggles of African Americans and women."); Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with it or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 412 (2011) (explaining the role of "emancipatory research" in disabilities studies).

the CRPD may turn into little more than a “paper victory”¹⁰² for persons with disabilities and their advocates.

Writing several years ago about the lack of adequate counsel made available globally to litigants in the involuntary civil commitment process, I concluded that “[t]he legislative and judicial creation of rights—both positive and negative—is illusory unless there is a parallel mandate of counsel that is (1) free and (2) regularized and organized.”¹⁰³ The same argument can be made with regard to the guardianship process.¹⁰⁴ Without the presence of counsel, the CRPD will have little authentic meaning for persons in peril of having guardianships imposed.

I have written frequently about the corrosive impact of *sanism* (an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry)¹⁰⁵ and *pretextuality* (the ways in which courts accept, either implicitly or explicitly, testimonial dishonesty and engage similarly in dishonest and frequently meretricious decision-making)¹⁰⁶ on mental disability law practice.¹⁰⁷ The mere filing of a guardianship petition is likely to trigger sanist reactions and pretextual decisions on the parts of judges assigned to hear such petitions; such reactions are likely to lead, unthinkingly, to the entry of draconian guardianship orders.¹⁰⁸

102. Perlin, *Promoting Social Change*, *supra* note 77, at 2 (“The CRPD clearly establishes, through hard law, the international human and legal rights of persons with disabilities, but in order for it to be more than a mere paper victory, it must be enforced.”).

103. Perlin, *A Global Perspective*, *supra* note 79, at 262.

104. Cf. Anne Seal & Michael A. Kirtland, *Using Mediation in Guardianship Litigation*, 39 COLO. LAW. 37, 40 (2010) (“The failure to mandate appointment of counsel for respondents in guardianship cases is a due process concern that has not been addressed.”).

105. See, e.g., Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373, 374-75 (1992).

106. See, e.g., Michael L. Perlin, *“Simplify You, Classify You”: Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 621 (2009).

107. See generally MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (2000) [hereinafter PERLIN, *DISABILITY ON TRIAL*]. I discuss sanism and pretextuality in an international human rights context in, for example: PERLIN, *WHEN THE SILENCED ARE HEARD*, *supra* note 6, at 33-37; Michael L. Perlin, *International Human Rights and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent*, 39 ISR. L. REV. 69, 89-91 (2006); Perlin, *“A Change is Gonna Come,”* *supra* note 19, at 496-97.

108. See PERLIN, *DISABILITY ON TRIAL*, *supra* note 107, at 51-55 (discussing sanist judges in general); see also *id.* at 47 (“Judges ‘are embedded in the cultural presuppositions that engulf us all.’”) (quoting Anthony D’Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329, 332 (1991)). On pretextual decisionmaking, see Michael L. Perlin, *“You Have Discussed Lepers and Crooks”:* *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 729 (2003); see also PERLIN, *DISABILITY ON TRIAL*, *supra* note 107, at 307 (“[J]udges must acknowledge the pretextual

B. *Need for Alternative "Personal" Guardians*

As indicated above, the guardian of choice in many nations is invariably the institution.¹⁰⁹ For the CRPD to have meaning, in those cases in which the weight of the evidence requires the entry of some sort of guardianship order, it is imperative that "personal" guardians be found: guardians who are more likely to make efforts to determine what the expressed views of their wards might be. Such personal guardians would optimally ensure that the guardianship not be overbroad. Without the presence of counsel, it is far less likely that such guardians will be located.

Just as in the case of the appointment of representative payees with regard to Social Security benefits, whereby federal regulations supply an order of preference that ranks family members, relatives, and legal guardians higher than state social service agencies or custodial institutions,¹¹⁰ so should family members and friends take precedence over impersonal institutions in the case of guardianship.¹¹¹ Discussing the role of institutional guardians in the context of proxy voting, Professor Jane Rutherford has lucidly laid out the reasons why such arrangements are problematic:

Institutional guardians lack many of the proposed criteria for effective proxy-holders. They do not have a personal, emotional commitment to the children and may hardly know them. They often come from different socioeconomic classes and fail to fully understand the perspectives of the children. They are not readily accessible to the children and have insufficient knowledge of the children's daily lives and experiences.¹¹²

basis of much of the case law in this area and consciously seek to eliminate it from future decision-making."). Professor Winsor Schmidt has referred to guardianship as "a sanist, ageist archetype." Winsor Schmidt, *Law and Aging: Mental Health Theory Approach*, in THEORIES ON LAW AND AGEING: THE JURISPRUDENCE OF ELDER LAW 121, 132 (Israel Doron ed., 2009).

109. See Dorothy Siemon et al., *Public Guardianship: Where Is It and What Does It Need?*, 27 CLEARINGHOUSE REV. 588 (1993); Winsor Schmidt, *The Wingspan of Wingspread: What is Known and Not Known About the State of the Guardianship and Public Guardianship System Thirteen Years After the Wingspread National Guardianship Symposium*, 31 STETSON L. REV. 1027 (2001); Winsor Schmidt, *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193 (2007).

110. See Katherine Krause, *Issues of State Use of Social Security Insurance Beneficiary Funds for Reimbursement of Foster-Care Costs*, 41 FAM. L.Q. 165, 167 (2007) (discussing 20 C.F.R. § 404.2021 (2004)).

111. See, e.g., Dan Brock, *What Is the Moral Authority of Family Members to Act as Surrogates for Incompetent Patients?*, 74 MILBANK Q. 599, 600, 606 (1996).

112. Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1510 (1998).

Professor Rutherford's observations hold equally true in the context of the guardianships at the heart of this article.

C. Need for Domestic Courts to Take Issues Seriously

As discussed above, there are already a handful of cases construing the CRPD in this context.¹¹³ However, these cases in no way should lull us into thinking that domestic courts will vigorously enforce the CRPD on a regular basis.¹¹⁴ Indeed, scholars agree that failure to comply with regional court rulings is a "grave" issue in domestic justice in many nations.¹¹⁵

Recently, in discussing institutional mental disability law cases litigated successfully before the Inter-American Commission of Human Rights and the African Commission on Human Rights,¹¹⁶ I concluded that "[i]t defies credulity to suggest that the high courts of Ecuador or Gambia would have decided the *Congo* or *Purohit* cases the way that the

113. See *supra* text accompanying notes 92-97.

114. This problem has been noted in the context of domestic courts in the United States. See, e.g., Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 429 n.8 (2002) (citing Elizabeth A. Reimels, *Playing for Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty—The U.S. Wants to Play the International Human Rights Game, But Only If It Makes the Rules*, 15 EMORY INT'L L. REV. 303 (2001)) (noting importance of U.S. compliance with human rights treaties and problems arising out of failure to enforce international law in domestic courts); Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493 (2011); David Sloss, *Legislating Human Rights: The Case for Federal Legislation to Facilitate Domestic Judicial Application of International Human Rights Treaties*, 35 FORDHAM INT'L L.J. 445 (2012); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57 (2011).

115. See Huneus, *supra* note 114, at 504 (quoting José Miguel Insulza, the Secretary-General of the Organization of American States (OAS): "[N]oncompliance of the resolutions of the [Inter-American] System . . . gravely damages it.").

116. See Perlin, *Promoting Social Change*, *supra* note 77, at 5-9 (discussing *Congo v. Ecuador*, Case 11.427, Inter-Am. Comm'n H.R., Report No. 63/99, OEA/Ser.L.V/II.95, doc. 7 ¶¶ 6-27 (1999) (as result of state's gross negligence and willful acts, patient died of malnutrition, hydro-electrolytic imbalance, and heart and lung failure, after being beaten with a club on the scalp, deprived of medical treatment, kept naked, and forced to endure complete isolation; Inter-American Commission found state responsible for agents' conduct that violated plaintiff's right to humane treatment under Article 5 of the Inter-American Convention on Human Rights, as interpreted in light of MI Principles, his right to "be treated with respect for the inherent dignity of the human person" under Article 5(2), and his right to life under Article 4(1)) (also discussing *Purohit & Moore v. The Gambia*, Afr. Comm'n Hum. & Peoples' Rts., Comm. No. 241/2001, ¶ 85 (2003) (Gambian domestic law—the "Lunatic Detention Act"—violated Article 6 of the African Charter on Human Rights as it authorized detention on the basis of opinions by general medical practitioners, did not have fixed periods of detention, and did not provide for review or appeal)).

interregional bodies decided them."¹¹⁷ I believe the same conclusion is appropriate in the context of guardianship law cases such as those discussed here.¹¹⁸

D. *What about Asia?*

There is no regional human rights court or commission in Asia or the Pacific.¹¹⁹ As a result, there are significant gaps between domestic law in the nations of Asia and the Pacific and international law, as reflected in the region's ineffective—often non-existent—implementation of the CRPD.¹²⁰ In a recent article, I urged the creation of a subregional disability rights tribunal in that area. Without such a body, it is likely that "severe violations of human rights for persons with mental disabilities will continue to occur in the states, due to local inability and lack of opportunity to enforce human rights and address ongoing rights violations."¹²¹ Indeed, the CRPD would not "have any significant impact on this population in Asia and the Pacific because of the lack of a regional court or commission in that area."¹²²

Without the presence of a regional tribunal vested with the authority to hear disability rights cases involving violations of the CRPD, there is little reason to be optimistic that Asian and Pacific region persons with disabilities facing improper guardianship will benefit from this Convention.¹²³

V. THERAPEUTIC JURISPRUDENCE¹²⁴

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of

117. See Perlin, *Promoting Social Change*, *supra* note 77, at 28.

118. See, e.g., *supra* notes 43-49 and accompanying text.

119. See Perlin, *Promoting Social Change*, *supra* note 77, at 10-12.

120. See *id.* at 12.

121. See *id.* at 29.

122. See *id.* at 37.

123. See Michael L. Perlin, Heather E. Cucolo & Yoshikazu Ikehara, *Online Mental Disability Law Education, a Disability Rights Tribunal, and the Creation of an Asian Disability Law Database: Their Impact on Research, Training and Teaching of Law, Criminology and Criminal Justice in Asia*, 1 ASIAN J. LEGAL EDUC. (forthcoming 2013) (discussing the need to educate Asian lawyers and law students in this aspect of international human rights law).

124. This section is largely adapted from PERLIN, A PRESCRIPTION FOR DIGNITY, *supra* note 3, ch. 6. See generally Michael L. Perlin, "There Are No Trials Inside the Gates of Eden": Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence, in COERCIVE CARE: RIGHTS, LAW AND POLICY (Bernadette McSherry & Ian Freckelton eds., 2012) (forthcoming 2013) (discussing the relationship between TJ and international human rights law in this context).

therapeutic jurisprudence (TJ).¹²⁵ Initially employed in cases involving individuals with mental disabilities, but subsequently expanded far beyond that narrow area, therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences.¹²⁶ The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.¹²⁷ There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: The law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."¹²⁸ As I have written elsewhere, "An inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties."¹²⁹

125. *E.g.*, DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008); MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, at 534-41 (2d ed. 1998). See David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 27, 32-33 (1992), for Wexler's description of how he first used the term "therapeutic jurisprudence" in a paper he presented to the National Institute of Mental Health in 1987.

126. See Michael L. Perlin, *"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 912 (2009); see also Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, in DISPUTES AND DILEMMAS IN HEALTH LAW 91 (Ian Freckelton & Kate Peterson eds., 2006) (providing a transnational perspective).

127. See Perlin, *Role of Counsel*, *supra* note 32, at 751; Michael L. Perlin, *"Everybody Is Making Love/Or Else Expecting Rain": Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. L. REV. 481, 510 n.139 (2008); see also Michael L. Perlin, *"Baby, Look Inside Your Mirror": The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589, 591 (2008) (quoting, in part, PERLIN, DISABILITY ON TRIAL, *supra* note 107, at 301) (discussing how TJ "might be a redemptive tool in efforts to combat sanism, as a means of 'strip[ping] bare the law's sanist façade"); Bernard P. Perlmutter, *George's Story: Voice and Transformation through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 599 n.111 (2005); Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 585-86 (2008).

128. See David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993); see also David Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCHOL. 179 (1996).

129. Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); Michael L. Perlin, *"Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, "Us" and "Them,"* 31 LOYOLA L.A. L. REV. 775, 782 (1998).

Therapeutic jurisprudence "asks us to look at law as it actually impacts people's lives"¹³⁰ and focuses on the law's influence on emotional life and psychological well-being.¹³¹ It suggests that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness."¹³² TJ understands that, "when attorneys fail to acknowledge their clients' negative emotional reactions to the judicial process, the clients are inclined to regard the lawyer as indifferent and a part of a criminal system bent on punishment."¹³³ By way of example, TJ "aims to offer social science evidence that limits the use of the incompetency label by narrowly defining its use and minimizing its psychological and social disadvantage."¹³⁴

In recent years, scholars have considered a vast range of topics through a TJ lens, including, but not limited to, all aspects of mental disability law, domestic relations law, criminal law and procedure, employment law, gay rights law, and tort law.¹³⁵ As Ian Freckelton has noted, "[I]t is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications."¹³⁶ It is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.¹³⁷ These alternative approaches optimize the psychological well-being of individuals, relationships, and communities dealing with a legal matter and acknowledge concerns beyond strict legal rights, duties,

130. Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

131. See David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in DANIEL P. STOLLE ET AL., *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 45 (2000).

132. Bruce J. Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in *INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT* 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).

133. Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47, 59 (2010).

134. Claire B. Steinberger, *Persistence and Change in the Life of the Law: Can Therapeutic Jurisprudence Make a Difference?*, 27 LAW & PSYCHOL. REV. 55, 65 (2003). The most thoughtful sympathetic critique of TJ remains Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193 (1995).

135. Michael L. Perlin, *"Things Have Changed": Looking at Non-institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 544-45 (2003).

136. Freckelton, *supra* note 127, at 582.

137. Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in STOLLE ET AL., *supra* note 131, at 465.

and obligations. In its aim to use the law to empower individuals, enhance rights, and promote well-being, TJ has been described as “a sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasises psychological wellness over adversarial triumphalism.”¹³⁸ That is, TJ supports an ethic of care.¹³⁹

One of the central principles of TJ is a commitment to dignity.¹⁴⁰ Professor Amy Ronner describes the “three Vs” as voice, validation, and voluntariness,¹⁴¹ arguing:

What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.¹⁴²

There has been some academic consideration of the guardianship process through a TJ filter, and some, though less, of the international human rights law universe through the same filter. But, to the best of my

138. Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329-30 (2001); see also Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 341 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605-06 (2006). The use of the phrase dates to CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

139. See, e.g., Winick & Wexler, *supra* note 138, at 605-07; David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn’s Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Brookbanks, *supra* note 138; Gregory Baker, *Do You Hear the Knocking at the Door? A “Therapeutic” Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006).

140. See WINICK, *supra* note 125, at 161.

141. Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008). On the importance of “voice,” see Freckelton, *supra* note 127, at 588.

142. Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94-95 (2002).

knowledge, there has been no consideration of the two substantive topics from this vantage point.

The guardianship literature¹⁴³ teaches that a TJ approach enhances autonomy and "can ultimately improve the quality of life for many persons in need of some form of guardianship arrangement by allowing for more control and participation in the guardianship process."¹⁴⁴ This literature also informs that expanding TJ considerations should be expanded to elder law in general¹⁴⁵ and that TJ can spawn a list of inquiries that should be included at any proceeding involving a potential infringement of autonomy rights in this area of law.¹⁴⁶

The international human rights literature teaches the following:

[T]he remedy for the abuses in the mental health system of Hungary and other Eastern European nations is a healthy dose of international human rights law and therapeutic jurisprudence. As that region moves from a medical, to a legal, to a therapeutic jurisprudence model of civil commitment, we can expect to see reforms in mental health law and practice that will both protect individual liberty and promote improved mental health and psychological well-being.¹⁴⁷

Elsewhere, I have said the following about the relationship between the CRPD and TJ:

143. For a consideration of the related question of testamentary capacity from a TJ perspective, see Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427 (2012); Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139 (2012).

144. Patricia C. McManus, *A Therapeutic Jurisprudential Approach to Guardianship of Persons with Mild Cognitive Impairment*, 36 SETON HALL L. REV. 591, 624 (2006). *But cf.* Schmidt, *supra* note 108, at 139 ("Guardianship [is] best perceived not through a therapeutic jurisprudence lens, but rather through a combination of guardianship outcome studies and a due process criticism.").

145. See MARSHALL B. KAPP, *THE LAW AND OLDER PERSONS: IS GERIATRIC JURISPRUDENCE THERAPEUTIC?* (2003); see also Marshall B. Kapp, *Reforming Guardianship Reform: Reflections on Disagreements, Deficits, and Responsibilities*, 31 STETSON L. REV. 1047 (2002).

146. See Jennifer L. Wright, *Protecting Who From What, and Why, and How?: A Proposal for an Integrated Approach to Adult Protective Proceedings*, 12 ELDER L.J. 53, 74 (2004):

[T]he empirical questions to be answered are: how reliable and consistent are our determinations of incapacity; what is the most accurate person or entity to make these determinations; how great is the risk of erroneous determination; how should the risk of erroneous determination be allocated to minimize antitherapeutic consequences; and are the antitherapeutic effects of wrongfully depriving a capable adult of autonomy better or worse than the antitherapeutic effects of failing to protect an incapable adult.

147. Bruce J. Winick, *Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 537, 572 (2002).

The Convention on the Rights of Persons with Disabilities . . . is a document that resonates with TJ values. It reflects the three principles articulated by Prof. Ronner—voice, validation and voluntariness—and “look[s] at law as it actually impacts people’s lives.” Each section of the CRPD empowers persons with mental disabilities, and one of the major aims of TJ is explicitly the empowerment of those whose lives are regulated by the legal system.¹⁴⁸

An integrated consideration of both of these bodies of law from a TJ perspective leads to the conclusion that the application of international human rights law—specifically, the CRPD—to the guardianship process is entirely consonant with TJ and with procedural justice values.¹⁴⁹ It privileges voice and autonomy; it privileges participation. It is clear from Professor Tom Tyler’s groundbreaking research that individuals with mental disabilities, like all other citizens, are affected by such process values as participation, dignity, and trust, and that experiencing arbitrariness in procedure leads to “social malaise and decreases people’s

148. PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 6, at 215 (quoting, in part, Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009), and citing, *inter alia*, Perlmutter, *supra* note 127; Thomas D. Barton, *Therapeutic Jurisprudence, Preventive Law, and Creative Problem Solving, An Essay on Harnessing Emotion and Human Connection*, 5 PSYCHOL. PUB. POL’Y & L. 921 (1999); Michael King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELBOURNE U. L. REV. 1096 (2008)). I also discuss this intersection in Perlin, *A Global Perspective*, *supra* note 79, at 252-53; Perlin, *The Impact of Wyatt v. Stickney*, *supra* note 37, at 132; Astrid Birgden & Michael L. Perlin, “Where the Home in the Valley Meets the Damp Dirty Prison”: *A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings*, 14 AGGRESSION & VIOLENT BEHAV. 256 (2009); Birgden & Perlin, *supra* note 23, at 232, 234-35.

149. “Procedural justice” asserts that “people’s evaluations of the resolution of a dispute (including matters resolved by the judicial system) are influenced more by their perception of the fairness of the process employed than by their belief regarding whether the ‘right’ outcome was reached.” Thomas L. Hafemeister et al., *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 200 (2012) (quoting, in part, Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 26 (2007)). The research is consistent: “[T]he principal factor shaping [the] reactions [of the general public] is whether law enforcement officials exercise authority in ways that are perceived to be fair.” Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 346 (2011) (citing, *inter alia*, TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING COOPERATION WITH THE POLICE AND THE LAW (2002)). And, the fairness of the process used to reach a given outcome is critical to perceptions of legitimacy. David Welsh, *Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy*, 9 U. N.H. L. REV. 261, 274 (2011). See generally PERLIN, A PRESCRIPTION FOR DIGNITY, *supra* note 3, ch. 6 (explaining the significance of procedural justice to cases involving litigants with mental disabilities).

willingness to be integrated into the polity, accepting its authorities, and following its rules."¹⁵⁰ I believe that, if we embrace TJ, and the precepts of procedural justice, we will have taken an important step towards meaningfully enforcing the CRPD in ways that, for the first time, will bring both due process and dignity to the guardianship system.

CONCLUSION

The CRPD has the capacity to restructure guardianship law around the world. Its empowering and emancipatory language, though, may prove to be of little "real life" value unless the variables that I discuss above—access to counsel, availability of personal guardians, enforceability in domestic courts, the Asian dilemma—are taken seriously, and unless remedial solutions are put in place. Professor Leslie Salzman has listed seven "best practices" that need to be taken carefully into account in any supported decisionmaking system.¹⁵¹ I agree fully with Professor Salzman as to the significance of the CRPD changing "the locus of decision-making authority—from the guardian to the individual needing support."¹⁵² Again, the mandate of Article 12 is clear: measures relating to the exercise of capacity must have safeguards that "respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial

150. Tom Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. Rev. 433, 443 (1992). Tyler's research is discussed in Perlin & Dorfman, *supra* note 32, at 119; *see also* Vidis Donnelly et al., *Working Alliances, Interpersonal Trust and Perceived Coercion in Mental Health Review Hearings*, 5 INT'L J. MENTAL HEALTH 29 (2011) (asserting that hearings perceived as lacking in procedural justice worsened working alliances between patients and physicians and diminished interpersonal trust) (cases heard in Ireland).

151. *See* Salzman, *supra* note 57, at 328-29. These practices include:

- 1) maximize the individual's responsibility for and involvement in decisions affecting his or her life; 2) ensure that the individual's wishes and preferences are respected; 3) ensure legal recognition of decisions made with support or by the individual's appointed agent; 4) provide the most appropriate qualifications and training for support persons, and standards for carrying out support responsibilities; 5) create the most efficient and effective mechanisms for funding support programs (including the possibility of volunteer support services); 6) have the most effective mechanisms for oversight and monitoring to ensure that the support relationship does not result in harm to the individual and protects against conflicts of interest, undue influence, or coercion of the individual needing support; 7) create standards for appointment of a substitute decision-maker that ensure that an individual is divested of decision-making rights only to the extent and for the time period that is absolutely necessary.

Id.

152. *Id.* at 285.

authority or judicial body.”¹⁵³ This mandate screams out for a universal overhaul of guardianship law and practice. I hope this article prods some into thinking about these issues.

In the past, I have written frequently about marginalized persons,¹⁵⁴ ones who are the “discrete and insular minorities” written about in the famous *Carolene Products* footnote.¹⁵⁵ I believe that, in *Chimes of Freedom* (the source of the article’s title), Dylan’s legal and political vision about this population is at its most profound.¹⁵⁶ If, as Mike Marqusee has aptly written, *Chimes* is “Dylan’s most sweeping view of solidarity with all those marginalized by a monolithic society,”¹⁵⁷ then the CRPD *does*—at least in theory—strike a blow “for the guardians and [the] protectors of the mind.” It is the responsibility of state parties, of lawyers, of advocates, of all those who take seriously this area of law and policy to translate that aspiration into reality.

153. CRPD, *supra* note 18, art. 12; see Salzman, *supra* note 90, at 233 n.232.

154. See, e.g., Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 Hous. L. Rev. 63, 67-68 (1991); Michael L. Perlin & John Douard, “Equality, I Spoke That Word/As If a Wedding Vow”: *Mental Disability Law and How We Treat Marginalized Persons*, 53 N.Y.L. Sch. L. Rev. 9 (2009).

155. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938):

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution. . . . [We] need [not] inquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. (internal citations omitted).

156. See Perlin, *Tangled Up in Law*, *supra* note 24, at 1419.

157. MIKE MARQUEE, CHIMES OF FREEDOM: THE POLITICS OF BOB DYLAN’S ART 94 (2003).